Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From January 1, 1958

Through March 31, 1958

VOLUME 90

JOHN PATTERSON, Attorney General

1958

QUARTERLY REPORT

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Volume No. 90

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1958, through March 31, 1958, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send secen copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prmpt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

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Confidential Assistant

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OPINIONS

January 10, 1958

Hon. Clarence F. Rhea
County Attorney
Etowah County Board of Revenue
Gadsden, Alabama

Road and Bridge Fund—Gasoline—Highways and Highway Department—Counties—Municipalities.

Highways located within the corporate limits of a municipality are streets as distinguished from county roads unless the Legislature authorizes such highways to be considered as roads.

In general, county funds derived from the proceeds of taxes authorized by Constitution of Alabama 1901, Section 215, and its share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, page 73, may not be used to repair, construct or maintain streets within the municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of December 9, 1957, is as follows:

"RE: Municipal Streets—County Roads

"Reference is made to a recent opinion rendered by you in response to a request made by the undersigned as attorney for Etowah County Board of Revenue concerning application of county monies to maintenance, repair or construction of city streets:

"1. Please advise us whether the County may use such funds for the repair, construction and maintenance of a County road which extends through a portion of a municipality. That is, can such funds be expended for such purpose on that portion of the road inside the city limits of the municipality when it is part of a through county road.

"2. Please advise whether such monies may be spent on that portion of a county road which is inside a municipalities city limits where such road originates outside of the municipality and terminates outside the municipality and only touches a small portion of the municipality

thereby serving its primary purpose citizens of the County rather than citizens of a municipality.

"3. Stated another way, please advise us whether that portion of a county road which originates outside of a municipality which terminates outside of a municipality is considered a 'street' and not a 'road' for the purpose of expending monies by the County for the repair, construction or maintenance of such thoroughfares.

"A request for a clarification of the opinion previously rendered has been authorized by the Etowah County Board of Revenue."

The opinion of this office to which your request refers was rendered to you under date of November 25, 1957. Said opinion discussed the use of the proceeds of certain ad valorem taxes levied by a county under the authority of the Constitution of Alabama 1901, Section 215. Said opinion also referred to an opinion of this office rendered to Hon. John Watkins, Legal Counsel, Alabama League of Municipalities, under date of October 21, 1957, which held that a county may not appropriate any part of its share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, page 73, to a municipality to be used for street maintenance within the corporate limits of such municipality. I assume that your request quoted hereinabove refers to the use of the proceeds of these two county taxes.

In the case of **Town of Clanton v. Chilton County**, 205 Ala. 103, 87 So. 345, the Supreme Court of Alabama said:

"In view of the restrictive provisions of section 215 of the Constitution, the county authorities were forbidden to devote or to apply, directly or indirectly, the product of such special levy to the repair, construction, or improvement of any street in the town of Clanton; funds so derived or to be collected being restricted to use on, or to improve, public roads of the county. City of Demopolis v. Marengo County, 195 Ala. 214, 70 South. 275; County of Montgomery v. City of Montgomery, 190 Ala. 366, 67 South. 311, collecting earlier decisions. Hence any effort of the county of Chilton to so engage with the town of Clanton (if so) was wholly void, impossible of valid consummation."

The opinion in the case of **Wiggins v. Skeggs, et al.**, 171 Ala. 492, 54 So. 756, reads, in part, as follows:

"The bill avers, and the fact is not disputed, that a part of the road in question is within the corporate limits of New Decatur. Such being the case, in the absence of legislative limitation or restriction, the municipality, and not the county commissioners, had the exclusive jurisdiction over same. All highways in a city or incorporated town are streets, as distinguished from a public county road. It is true the legis-

lature has the inherent power, in the absence of constitutional restriction, to control the highways of the state in or out of the limits of the municipal corporation, . . ." (Emphasis supplied.)

In **McCain v. The State**, 62 Ala. 138, the Court held that when a rural district is made the site of an incorporated town, exclusive jurisdiction and authority over the public roads and highways, theretofore existing within the corporate limits, pass to the corporate authorities.

Your attention is directed to the case of **Ryan, Treasurer, v. Goodrich and Crinkley**, 199 Ala. 642, 75 So. 17. In this case, the commissioners' court ordered the contractors to improve a certain public road, to wit, the Decatur and Somerville Pike, "within the corporate limits of the City of New Decatur, Morgan County, Alabama." The work was done at a cost of over $4,000.00. A warrant was issued, but the treasurer refused payment on the ground that the court of county commissioners had no authority to make such improvements. Then the Legislature passed an act authorizing payment. The court held that payment could be authorized by the Legislature.

In the case of **State ex rel. City of Mobile v. Board of R. and R. Com., Mobile County**, 180 Ala. 489, 61 So. 368, an act of the Legislature was held constitutional which divests the City of Mobile of the duty of repairing the streets named therein, and imposes such duty on the Board of Revenue and Road Commissioners of Mobile County. To like effect is **City of Mobile v. Harker**, 204 Ala. 26, 85 So. 425.

Act No. 329, General Acts 1943, page 311, known as the Farm to Market Road Act of 1943, reads, in part, as follows:

"The words 'county roads' as herein used shall mean all public roads (including bridges) within a county and continuing into or through the corporate limits of any city or town in such county which are not a part of the state highway system and which are sometimes called 'farm to market roads'. . ."

In an opinion reported in Quarterly Report of Attorney General, Vol. 71, page 17, it was held that a road may be constructed within a municipality under the provisions of Act No. 329, supra.

In the light of the above authorities, I am of the opinion that all highways located within the corporate limits of a municipality are streets as distinguished from public county roads unless some act of the Legislature authorizes such highways to be considered as "roads."

Nothing in your request indicates that the streets there mentioned could be considered as Farm to Market Roads under the authority of Act No. 329, supra, and I know of no other statute which authorizes your county to construct or maintain a road within the corporate limits of a municipali-

ty out of the funds in question, viz., proceeds of said tax authorized by the Constitution of Alabama 1901, Section 215, and said gasoline tax.

Therefore, I am of the opinion that your county may not use the funds here considered to repair, construct or maintain the streets to which your request refers.

I trust that this opinion is a complete answer to all questions contained in your request.

Yours very truly,

JOHN PATTERSON
Attorney General

January 14, 1958

Hon. Gene Dilmore, Member
Board of Equalization
Jefferson County
601-5 Court House
Birmingham, Alabama

Taxation—Tax Assessors—Leases—Assessments—Property.

1. The general rule in this State is that where buildings or improvements are constructed by one person on the land of another, that such buildings become a part of the real estate and the property of the landowner.

2. An important exception to said general rule is where a lessee under the terms of a lease or contract reserves the right to remove such buildings from the land, and if it is possible to remove them, then such buildings do not become a part of the realty, but continue to be personal property and the property of the lessee and would be assessable to the lessee as personal property.

3. Another exception to the general rule is where buildings are erected by a lessee on land exempt from taxation as the property of the government or some other agency which is exempt from taxation, and the lessee has the full use, enjoyment, and possession of such buildings during their normal lifetime, and the life of the buildings is of shorter duration than the life of the lease, then the lessee is the actual owner

of the buildings for tax purposes, regardless of who is said to have the paper title, and under such circumstances the buildings are assessable under Title 51, Section 21, Code of Alabama 1940, as the real property of the lessee.

4. Where the same circumstances exist as are described in Headnote 3, except for the fact that the lessor and owner of the land is not exempt from taxation and he would be subject to the payment of taxes on the land, there appears to be good authority to support the ruling that for tax purposes the lessee would still be the owner of the buildings, and that they would be taxable to the lessee as realty under Title 51, Section 21, Code of Alabama 1940.

5. Under the provisions of Title 51, Section 142, Code of Alabama 1940, the assessment of all property of railroads and public utilities is exclusively within the jurisdiction of the State Department of Revenue. Where, however, buildings are erected on the lands of such utilities by the lessee who reserves the title to such buildings, or who is the actual owner of said buildings, then under such circumstances, and subject to the principles above outlines, the local taxing authorities may tax the lessee's ownership in such buildings, if the lessee is not also a public utility.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of December 4, 1957, is as follows:

"Your official opinion is respectfully requested on the following questions:

"1. In the case of separate ownerships of building and land, as a building owned by Lessee on leased land, may the assessing authority assess the building together with the land as real property to the Lessor,

"(a) If the building may be removed by Lessee at expiration of the lease.

"(b) If the building becomes property of the Lessor at expiration of the lease.

"2. When a building on leased land would be otherwise unassessable

by the local assessing authority, may the assessing authority assess the building, either as personal property, or as real property designated as building only,

"(a) If the building is owned by taxable Lessee on land owned by an exempt Lessor (as a building owned by a private corporation on land owned by municipality).

(b) If the building is owned by Lessee assessable by the local assessing authority, on land owned by public utility assessable by the State Department of Revenue."

It will not be possible for me to answer your questions categorically or in a way so as to fit every case even though you have broken down your questions into four particular categories. This is true because the correct answer in each case would depend upon the facts. This would include a consideration of the terms of the lease and whether it is to be of a long duration or a short one. These things will assume importance when some of the legal principles involved have been considered.

The general rule is to the effect that where buildings or other improvements are constructed by one person on the land of another that such improvements become a part of the realty and may not be taxed to the builder or the lessee, but are taxable to the landowner as a part of the real estate. 32 Am. Jur., Landlord and Tenant, Section 288; 61 C. J., page 187, Section 150; 61 C. J., page 209, Section 183; Quarterly Report of Attorney General, Vol. 29, page 45; and Quarterly Report of Attorney General, Vol. 36, page 62.

Title 51, Section 1(b), Code of Alabama 1940 also provides in this respect, as follows:

"The term 'real property' shall be held to mean and include not only land, city, town, and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot."

In the case of **Ken Realty Company vs. State**, 247 Ala. 610, 25 So. 2d 675, the Supreme Court of Alabama in interpreting Title 51, Section 21, Code of Alabama 1940, and particularly subsections (a) and (n), prescribing the subjects of taxation, held that except for certain interest in the minerals, turpentine, oil, petroleum, and natural gas, "**the entire interest is to be assessed to the owner and not separate interests in the property, less than the interests of owners, to separate persons.**" (Emphasis supplied.)

To the same effect the court also held in **State vs. White Furniture Company**, 206 Ala. 575, 90 So. 896, as follows:

"It is not to be presumed that the Legislature intends that the same property is to be assessed against two persons, as the property of each, although one may have the legal and the other an equitable title thereto; or although one may have the general and the other a special property therein."

On, however, the question of who might be considered as the owner of the property, the court in **Ken Realty Company vs. State,** supra, pointed out that it is well settled that one in possession under an executory contract of sale could be taxed as the owner. The courts have also generally held that the holder of the equitable title who is in possession of the property is the actual owner for the purpose of taxation. **Offutt Housing Company vs. County of Sarpy,** 351 U. S. 253, 76 S. Ct. 814; **Brookley Manor vs. State,** 265 Ala. 141, 90 So. 2d 161.

The general rule that improvements belong to the owner of the land also has a very important exception, which is stated as follows in 27 Am. Jur., Improvements, Section 4:

"§ 4. EFFECT OF AGREEMENT WITH LANDOWNER.—An execption to the general rule that improvements belong to the owner of the land is found in the well-established principle that a structure erected by one man on the land of another, with his permission, on an agreement or understanding that it may be removed at the pleasure of the builder, does not become a part of the real estate, **but continues to be a personal chattel and the property of the person who erected it, and may be removed by him at least,** if it is readily removable. Buildings and other improvements placed upon real estate may be treated as movable personal property where such was the intention of the contracting parties and where such intention is clearly expressed in the contract of the parties with reference thereto." (Emphasis supplied.)

This exception to the general rule has been universally accepted and is also an established principle in Alabama. **Foster vs. Mabe,** 4 Ala. 402; **Middleton vs. Alabama Power Company,** 196 Ala. 1, 71 So. 461.

A modification of said exception appears to have been made in recent cases where the reasonable lifetime or expectancy of a building is of shorter duration than the life of the lease and the lessee has the possession and enjoyment of the building for its normal lifetime. In such cases the lessee is said to be the owner of the building for tax purposes, and that it is assessable to him as real property. **Offutt Housing Company vs. County of Sarpy,** supra; **Brookley Manor vs. State,** supra.

The basis of this distinction or modification appears to be that where the lease is of short duration, the lessee has the right (where the lease so provides) to remove the building before it fully depreciates and in doing

so he removes it as his personal property. On the other hand, and where the lessee has the full use and enjoyment of the building during its normal lifetime, and the lease expires after the lifetime of the building, then the building has continued to be during its entire lifetime real property. Therefore, in the first instance the building would be assessable to the lessee as personal property. In the second illustration the building would be assessable to the lessee as real property as in the **Brookley Manor** case, supra.

Of particular interest in this connection is the recent decision of Alabama Supreme Court in **Brookley Manor vs. State**, supra, which case has already been referred to. The **Brookley Manor** case involved the construction by a private corporation of one hundred and seventy-five apartment units on a parcel of land located on the government reservation at Brookley Field, Mobile County, Alabama, which land was leased to the private corporation by the Government for a period of seventy-five years. Under the terms of the lease, the private corporation was to have the possession, full use and enjoyment of the apartment buildings and the benefits (including the rent) therefrom during the lifetime of the lease (for said period of seventy-five years), although under the conditions of the lease the title to the buildings was said to be in the United States. The lease was made pursuant to the authority of the Federal Military Leasing Act of 1947 (10 U. S. C. A. 1270, et seq.), and the Wherry Military Housing Act of 1949 which added Title VIII to the National Housing Act (12 U. S. C. A. 1748). The land on which the apartment buildings were constructed was exempt from taxation as the property of the United States.

Under the circumstances, the Tax Assessor of Mobile County, Alabama, assessed the ownership and complete interest in the apartment buildings as real estate and in the name of the private corporation as the owner. No attempt was made to assess any interest in the parcel of land involved. After a hearing in the matter, the Mobile County Board of Equalization affirmed the assessment as made by the tax assessor and an appeal was taken to the Mobile County Circuit Court. That court also upheld the assessment, and made the following ruling:

> "It is sometimes well to state, in addition to what the point of decision is, to also state what it is not. **This is not an assessment against the United States, or against any land belonging to them, nor against any leasehold estate therein, but against such right, title, and interest in the 175 dwelling units as may be owned by the appellant, as the general and beneficial owner of same,** who indisputedly has built and is renting same as a private enterprise in competition with others who build and rent houses. This is not a case for this court to determine whether the state has a lien on the land, but merely for the court to determine whether the interest of the appellant in the property

assessed in the agreed statement of facts is subject to the assessment made."

The decision of the lower court in upholding the assessment as aforesaid was affirmed by the Supreme Court of Alabama in **Brookley Manor vs. State**, supra.

In deciding the **Brookley Manor** case, the Alabama Supreme Court followed the decision of the Supreme Court of the United States in **Offutt Housing Company vs. County of Sarpy**, supra, a very similar case which originated in the State of Nebraska and under the ad valorem tax laws of that state. In deciding the **Brookley Manor** case, the Supreme Court of Alabama reached the following conclusions:

"The Court observed that the enjoyment of the entire worth of the buildings and improvements will be that of the lessee, the private corporation, in view of the fact that the lease is for seventy-five years and the buildings and improvements have an estimated useful life of thirty-five years.

"We construe the opinion as holding in effect that while the title may be in the government, the real owner of the housing project as far as state and county taxation is concerned is the private corporation. We quote: 'The Government may have "title," but only a paper title, and while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it.'

"This court in the case of Ken Realty Co. v. State, 247 Ala. 610, 25 So. 2d 675, 166 A. L. R. 588, reaffirmed the rule prevailing in this state that paper title alone is not always determinative of ownersh p for tax purposes. See also Ken Realty Co. v. Johnson, 5 Cir. 138 F. 2d 809." (Emphasis supplied.)

After so concluding, the Alabama Supreme Court then affirmed the decision of the lower court in holding that the private corporation was the owner of the buildings for the purpose of said ad valorem taxes, and that the assessment made against said private corporation as the owner of said buildings was correctly made. The **Brookley Manor** case then appears to recognize the principle that where the landowner is the government or is otherwise exempt from taxation that the lessee for tax purposes is under the circumstances which have been enumerated the actual owner of the buildings, and that the buildings are assessable against him as the owner and as real estate. In the **Offutt Housing Company** case, supra, and in the **Brookley Manor** case, supra, the Supreme Courts of the United States and of Alabama, respectively, recognized that the reason-

able lifetime or expectancy of the apartment buildings under consideration in those cases would be thirty-five years. This would, however, not appear to be an infallible guide for other types of buildings or improvements, as the lifetime of same would vary in accordance with the particular kind or type of building involved, together with other circumstances, including whether the buildings were rental property or occupied by the owner.

Whether the doctrine of these cases would apply to situations other than where the land covered by the lease and on which the buildings are constructed is exempt from taxation as the property of the government or some other agency which enjoys an exemption from taxation, can be said to still be somewhat of an open question. The question as to what might have been the decision of the court, where under similar circumstances the land involved was not owned by the government or some other agency enjoying a tax exemption, was not presented in the **Brookley Manor** case. However, after a careful study of the **Brookley Manor** case, supra, in its entirety, it is my opinion that the case would have a broader application than just applying to situations where the landowner under the circumstances was exempt from taxation. Moreover, it would at least to a degree appear to modify the doctrine of **Ken Realty Company v. State,** supra, and **State vs. White Furniture Co.,** supra, insofar as the assessment of the ownership of buildings is concerned, where the actual owner of the buildings during their lifetime is a lessee or different person from the owner of the land on which such buildings have been constructed. In such cases, as was very clearly pointed out in the decision of the lower court in the **Brookley Manor** case, which decision was quoted in material part by the Alabama Supreme Court in its decision affirming the lower court's decision in the same case, there is no question of a leasehold interest being involved, but the assessment is against the total or entire ownership in said buildings, as the lessee in such cases is said to be the owner of said building during their lifetime, which is of shorter duration than the lifetime of the lease.

With the foregoing as a background, I will endeavor to answer your questions as specifically as I possibly can under the circumstances. Before doing so, I do wish to reiterate the importance of carefully considering the facts in each individual case, together with the principles which have been hereinabove enumerated, in order to arrive at a correct answer in an individual case.

Your questions are dealt with in accordance with the numbers designated by you, as follows:

1(a) If the lease provides that the buildings may be removed at the expiration of the lease by the lessee, and if it is possible to remove them, the first exception hereinabove enumerated to the general rule would apply, and the buildings would be considered as the personal property of

the lessee, and taxable as such to him. Your question 1(a) is then answered in the negative.

1(b) If the lease provides that the buildings are to become the property of the lessor at the time of its termination, then, generally speaking, under the rule herein above stated the buildings upon being erected would became a part of the real property owned by the lessor and landowner and would be assessable to the lessor as a part of his real estate. This would be subject to exception if under the facts (and regardless of the alleged paper title) the lessee is the actual owner of the buildings during their normal lifetime, and the principles of the **Brookley Manor** case, supra, could be said to apply.

2(a) Where buildings are actually owned by the lessee, and such ownership continues for the normal lifetime of the buildings, which is of shorter duration than the life of the lease, where they have been erected on land belonging to the government or some other tax exempt agency, then the principles of the **Brookley Manor** case would clearly apply, and the buildings would be for tax purposes considered to be the property of the lessee, and assessable as such by the local assesing authorities as the real property of the lessee.

Where, on the other hand, the buildings are owned by the lessee by virtue of the terms of the lease agreement (such as the right to remove them) and it is possible to remove the buildings during their lifetime, and on or before the termination of the lease, then under the exception to the rule, the buildings may be considered for tax purposes as the personal property of the lessee, and assessable to him as such by the local taxing authorities.

2(b) Under the provisions of Title 51, Section 142, Code of Alabama 1940, the right to assess for ad valorem taxation the property both real and personal of all railroads and public utilities is exclusively in the State Department of Revenue, and no local assessing authorities have the right to assess such property. However, if buildings or other improvements located on land belonging to railroads or public utilities are owned by the lessee under the circumstances as have been enumerated by you, then such buildings and improvements would not be the property of such utility and could be properly assessed by the local taxing authority as the property of the lessee. Whether such buildings would be assessable against the lessee as realty or as personal property would depend on the same conditions as have been set out under my answer to your question 2(a).

Very truly yours,

JOHN PATTERSON
Attorney General

January 23, 1958

Hon. Pleas Looney
Director
Planning & Industrial Development Board
Montgomery, Alabama

Bonds—Interest—Municipalities.

Bonds issued under the authority of Act No. 756, General and Local Acts 1951, page 1307, and Act No. 648, General and local Acts 1949, page 991, may not bear interest at a rate which exceeds eight percentum per annum.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of January 2, 1958, is as follows:

"This Department would like very much your opinion as to the following query on the Wallace and Cater Acts.

"Does the Wallace Act and Cater Act as written require that a ceiling be placed on the interest paid from the bonds?

"I would appreciate an early opinion as this point is holding up a negotiation between an industry and a certain municipality."

The statute, commonly called the Wallace Act, is Act No. 756, General and Local Acts 1951, page 1307.

The statute, commonly called the Cater Act, is Act No. 648, General and Local Acts 1949, page 991.

Neither Act No. 756, supra, nor Act No. 648, supra, places a ceiling upon the rate of interest which the bonds issued under the authority of said acts may bear. Your attention is directed to Section 4 of Act No. 756, supra, and to Section 9 of Act No. 648, supra.

Title 9, Section 60, Code of Alabama 1940, reads as follows:

"§ 60. Rates of interest fixed at six and eight percent.—The rate of interest upon the loan or forbearance of money, goods or things in action, except by written contract, is six dollars upon one hundred dollars for one year, and the rate of interest by written contract is

not to exceed eight dollars upon one hundred for one year; and at that rate for a greater or less sum, or for a longer or shorter time."

Therefore, I am of the opinion that bonds issued under the authority of Act No. 756, supra, and Act No. 648, supra, may not bear interest at a rate which exceeds eight percentum per annum.

Yours very truly,

JOHN PATTERSON
Attorney General

January 23, 1958

Honorable Alfred F. Delchamps
President
Board of School Commissioners
Mobile County
Box 1549
Mobile, Alabama

Schools—Funds—City Boards of Education—County Boards of Education

1. The Board of School Commissioners of Mobile County, Alabama has the legal authority to expend public school funds in the amount of two hundred fifty dollars ($250) per year to cover membership dues in the State School Board Association. Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of January 15, 1958, is as follows:

"It is the desire of the Board of School Commissioners of Mobile County to become members of the State School Board Association. The membership fee for Mobile County is $250.00 per annum. Last fall the Board authorized the superintendent to arrange for Mobile County membership in this Association, provided such membership had the approval of our Attorney, and provided a sufficient number of school boards in the state gave notice of their intention to participate. When this matter was referred to our Attorney, Mr. Palmer Pillans, certain questions were raised concerning the legality of our membership. Our Attorney indicated that it might be wise for our

School Board to get a ruling from you before making a final decision. Therefore, the problem resolves itself into this question: **"Does our school Board have the legal authority to expend public school funds in the amount of $250.00 per year to cover membership dues in the State School Board Association?"**

Act No. 317, General and Local Acts of Alabama 1955, page 718, provides as follows, insofar as here pertinent:

"Section 1. That the Alabama Association of School Board Members is hereby recognized as the organization and representative agency of the members of the school boards of Alabama.

"Section 2. That the State Superintendent of Education, the State Department of Education and the Boards of Education of the county and city systems are hereby empowered and authorized to co-operate with the Alabama Association of School Board Members in its in-service training program for school board members and in encouraging and fostering co-operation among the school boards affiliated with the Alabama Association of School Board Members.

"Section 3. Members of the State, County and City Boards of Education are authorized to pay dues to and also may incur reasonable traveling and subsistence expenses in attending meetings of the Alabama Association of School Board Members with which it is affiliated. Such dues and expenses may be paid as other expenses are paid by such Boards of Education."

It is my opinion that the Board of School Commissioners of Mobile County comes within the provisions of the above Act. **Ex parte Board of School Com'rs. of Mobile,** 230 Ala. 304, 161 So. 108; **Board of School Commissioners of Mobile County v. Hahn,** 246 Ala. 22 So.2 d 91.

Your question is, therefore, answered in the affirmative.

Yours very truly,

JOHN PATTERSON
Attorney General

January 30, 1958

Hon. B. M. Walton
Commissioner
District Two
Court of County Commissioners
Butler County
Greenville, Alabama

Counties—Gasoline—Gasoline Fund—Highways and Highway Department—Municipalitie—Road and Bridge Fund—Streets—Opinions overruled, Modified or Distinguished.

1. Highways located within the corporate limits of a municipality are streets as distinguished from county roads unless the Legislature authorizes such highways to be considered as roads.

2. Generally, county funds derived from the proceeds of taxes authorized by the Constitution of Alabama 1901, Section 215, and its share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, page 73, may not be used to construct or maintain streets within a municipality, either directly or by use of county forces, equipment or materials.

3. Any county funds not earmarked for other purposes may be used to maintain or construct a street within the corporate limits of a municipality.

4. Opinions reported in Quarterly Report of Attorney General, Vol. 54, pp. 32 and 105, overruled insofar as said opinions are in conflict with the opinion herein expressed.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of January 13, 1958, is as follows:

"It is requested that a clarification of a recent ruling pertaining to constructing and paving streets within a municipality, where city officials request assistance from the county, be made on the following points:

"1. Can a county with its own forces, equipment and materials con-

struct and pave streets within a municipality from the gasoline tax fund?

"2. Can a county with its own forces, equipment and materials construct and pave streets within a municipality from the Road and Bridge fund?

"3. Can a county transfer funds from the general fund to the road and bridge fund for construction purposes inside a municipality, using county forces, equipment and materials?

"4. Can county funds be expended for work inside a municipality under Title 23, Section 49 (1367) 1940 Code of Alabama, and if so what fund or funds may be used?

"This information is requested to cover requests made to this court for work inside city limits of the several towns and cities in this county. We do not intend to make an appropriation or grant to any town or city, but plan to perform this work with the regular forces, equipment and materials, if legal to do so.

"It would be appreciated very much if you can render a ruling on this by January 27th if possible."

Highways located in the corporate limits of a municipality are streets as distinguished from county roads unless the Legislature authorizes such highways to be considered as roads. Opinion to Hon. Clarence F. Rhea, County Attorney, Etowah County, Board of Revenue, under date of January 10, 1958. Nothing in your request indicates that your county contemplates constructing or paving a street within the corporate limits of a municipality which would, under any act of the Legislature, be considered as a county road.

In an opinion of this office rendered to Hon. John Watkins, Legal Counsel, Alabama League of Municipalities, under date of October 21, 1957, it was held that a county may not appropriate any part of its share of the gasoline tax levied by Title 51, Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, page 73, to a municipality to be used for street maintenance within the corporate limits of such municipality. See opinion reported in Quarterly Report of Attorney General, Vol. 87, page 15.

The Constitution of Alabama 1901, Section 215, reads, in part, as follows: ". . . . that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county

may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

Our Supreme Court has held on numerous occasions that the proceeds of the tax which is levied by the counties of this state pursuant to the above-quoted portion of Section 215, supra, may not be used to construct or maintain municipal streets. See cases cited in the opinion to Hon. John Watkins, under date of October 21, 1957, supra.

Title 23, Section 49, Code of Alabama 1940, reads as follows:

"§ 49. Road in municipalities.—The court of county commissioners or like governing body of any county, with the consent or permission of the city council or governing body of any municipality, may establish, construct and maintain any road, street or bridge within the corporate limits of such municipality, except in cases where the highway department has jurisdiction over such road, street or bridge."

Under the authority of Section 49, supra, a county governing body may, with the consent or permission of the governing body of a municipality, establish, construct and maintain any road, street or bridge within the corporate limits of such municipality, except in cases where the Highway Department has jurisdiction over such road, street or bridge. Quarterly Report of Attorney General, Vol. 55, page 125. However, as pointed out above, a county may not use for such purposes its share of the proceeds of said gasoline tax or the proceeds of the ad valorem taxes levied by virtue of that portion of Section 215, supra, quoted herein.

I am of the opinion that there is no distinction between a county appropriating funds to a municipality to be used to construct or maintain its streets and a county otherwise using such funds to construct or maintain said street.

You will note from the foregoing that the use of the county funds to construct and maintain streets within the corporate limits of a municipality depends upon the source of such fund.

Therefore, your first question is answered in the negative.

I assume that your road and bridge fund consists of the proceeds of your county's share of said gasoline tax and the ad valorem tax levied by virtue of the portion of Section 215 quoted herein. Upon the basis of this assumption, your second question is answered in the negative.

Title 23, Section 47, Code of Alabama 1940, reads as follows:

"Surplus from general fund of county transferred to road fund; use of gas tax funds.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

I am of the opinion that Section 47, supra, prevents a county from using monies which have been transferred from its general fund to its road and bridge fund to maintain or construct streets in the corporate limits of a municipality.

Therefore, your third question is answered in the negative.

In answer to your fourth question I am of the opinion that any county funds not earmarked for other purposes, by law or otherwise, may be used to maintain or construct streets within the corporate limits of a municipality pursuant to Section 49, supra.

The opinions reported in Quarterly Report of Attorney General, Vol. 54, pp. 32 and 105, insofar as they conflict with the opinion herein expressed are hereby overruled.

Very truly yours,

JOHN PATTERSON
Attorney General

February 6, 1958

Hon. C. C. Horton, Director
Department of Veterans Affairs
State Office Building
Montgomery, Alabama

Merit System—Veterans—Military and Naval Affairs—

January 31, 1955 is the cutoff date for veterans of the Korean Conflict as to the five and ten point preferences provided for in Title 55, Section 305, Code of Alabama 1940, as amended by Act No. 283, General and Local Acts 1951, page 568, as regards

entrance examinations into classified service under the State Merit System.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of February 3, 1958, presents the following inquiry:

"What is the cutoff date for veterans of the Korean hostilities as to the five and ten point preferences provided for in Title 55, Section 305, Code of Alabama 1940, as amended by Act No. 283, General and Local Acts 1951, page 568, as regards entrance examinations into the classified service under the State Merit System?"

In answer to your inquiry, it is my opinion that January 31, 1955 is the proper cutoff date in question under the above code section, as amended.

Section 305, supra, as amended, provides in pertinent part as follows:

"The director shall conduct tests to establish employment registers for the various classes of positions in the classified service. * * * * All persons who have been honorably discharged from the army, navy, air force, marine corps, or coast guard, who served in the armed forces of the United States during the period of a war, or during any time, past, present or future when the United States was, is or shall be engaged in hostilities with any foreign state, whether as a result of a declared war or not, shall have five points added to any earned ratings in examination for entrance to the classified service; provided, however, that such person be a qualified voter in Alabama or has been a resident of this state for two years next preceding his or her application; all persons who served in the armed forces of the United States during the period of a war, or during any time, past, present or future, when the United States was, is or shall be engaged in hostilities with any foreign state, whether as a result of a declared war or not, who have been honorably discharged and who establish by official records of the United States the present existence of a service-connected disability, and because of disability are entitled to pension, compensation, or disability allowance under existing laws; and widows of such persons who shall have died in line of duty during any such period; and widows of such persons who shall have been honorably discharged from the army, navy, air force, marine corps, or coast guard; and wives of such persons who shall have been honorably discharged from the army, navy, air force, marine corps, or coast guard, who because of service-connected disability are not themselves qualified but whose wives are

qualified, shall have ten points added to any earned ratings. * * * *" (Emphasis added)

The emphasized portions of the above quoted code section, as amended, are substantially the same as that contained in Amendment XC to the Constitution of Alabama 1901, which relates to the poll tax exemption of veterans. In construing the poll tax exemption under this constitutional amendment, this office has heretofore ruled that the termination date of the Korean Conflict—for the purpose of establishing the exemption of veterans from poll tax thereunder—was January 31, 1955 by Presidential Proclamation.—Quarterly Report of the Attorney General, Volume 78, page 42; Quarterly Report of the Attorney General, Volume 84, page 40.

The same reasoning and holdings of these opinions are equally applicable to the instant inquiry.

It is, therefore, my opinion that the cutoff date for veterans of the Korean hostilities as to the five and ten point preferences in question is January 31, 1955.

Yours very truly,

JOHN PATTERSON,
Attorney General.

February 12, 1958

Hon. Clarence F. Rhea
County Attorney
Etowah County
Gadsden, Alabama

Witnesses—Costs and Fees.

1. The county governing body is authorized to pay the expenses for the employment of an expert when the sheriff makes an investigation at the request of the solicitor under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940.

2. An expert witness is not usually entitled to receive extra compensation for his testimony.

3. A county is not authorized to pay an expert witness for his services in connection with his testimony in the absence of an implied contract and when the expert was not employed by the sheriff as part of an investigation requested by the solicitor

under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of February 4, 1958, is as follows:

"Re: Witness fees for professional services rendered by C. D. Brooks
"We have been authorized by the Etowah County Board of Revenue to request an opinion and ruling of your office on the following matters:

"1. Does the Etowah County Board of Revenue have the authority to pay a fee to 'examiner of questioned documents' for services rendered in connection with the case of the State of Alabama vs. Helen Christison where the Circuit Solicitor certifies to the Board of Revenue that the person rendering such professional services as a witness was necessary and material to the State's case?

"The provisions of Title 54, Sections 9 and 10 of the Code of Alabama of 1940 wherein a Sheriff is required to make an investigation of criminal cases under certain circumstances may be pertinent.

"An attorney general's opinion dated July 1, 1952 directed to the solicitor of the 28th Judicial Circuit wherein the county governing body of Baldwin County was authorized to reimburse a Court Reporter for a transcript of testimony wherein the first case ended in a mistrial."

I find no authority under the facts stated in your inquiry for the county to pay a fee to the examiner of questioned documents.

In an opinion of this office referred to in your inquiry under date of July 1, 1952, found in Quarterly Report of Attorney General, Vol. 68, page 7, this office held that a circuit solicitor, under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940, may request the sheriff to investigate a crime. This opinion further holds that in the course of the sheriff's investigation, the sheriff may incur expenses by employing a court reporter to transcribe certain testimony needed in the investigation and that under such circumstances the county governing body is authorized to pay the expense of the investigation, including the amount charged by the court reporter for his services.

From the facts stated in your inquiry, it does not appear that the sheriff made an investigation at the request of the solicitor and that the expenses incurred in the employment of a handwriting expert or examiner

of questioned documents were expenses incurred in a sheriff's investigation.

On the other hand, it appears that the solicitor has merely certified to the county governing body that the person rendering those services was necessary and material to the State's case.

In my opinion, this is not sufficient to authorize the county to pay said expenses. Ordinarily, an expert is not entitled to be paid for his testimony. Title 7, Section 366, Code of Alabama 1940; **Ex parte Dement**, 53 Ala. 389, 25 Am. Rep. 611; **Hartley v. Alabama National Bank of Montgomery**, 247 Ala. 651, 25 So. 2d 680. In some cases where preliminary preparation is necessary for the testimony an implied contract may afford a basis for the witness's claiming compensation from the person calling him. **Hartley v. Alabama National Bank of Montgomery**, supra. There are no facts stated in your inquiry which could be interpreted as showing an implied contract between the county and the witness.

I do not know of any way whereby the county could legally pay such expenses except as a part of a sheriff's investigation requested by the solicitor under the provisions of Title 54, Sections 9 and 10, supra.

It is not stated in your inquiry whether or not the solicitor in Etowah County has a solicitor's fund. Such expenses may be payable from said fund depending on the wording of the act creating the fund.

Yours very truly,

JOHN PATTERSON
Attorney General

February 17, 1958

Honorable Ralph P. Eagerton
Chief Examiner
Dept. of Examiners of Public Accounts

CAPITOL

Filing Tax—Deeds—Mortgages—Options—Leases—Taxation

In determining the applicability of filing tax and the amount thereof for recording a deed, transfer or similar conveyance, the Judge of Probate must ascertain the value of property in any instrument shown to be transferred by any of the pro-

visions of such conveyance. Various questions discussed under facts stated.

Opinion by Assistant Attorney General Payne.

Dear Sir:

Your request for an official opinion, bearing date of January 2, 1958, is as follows:

"It seems that during the past several months the Gulf Refining Company has been transferring all of its corporate properties to its successor, the Gulf Oil Corporation. It seems that this agreement of transfer was entered into on the 31st day of December 1956 and that during the past year the transfer of such property has been taking place throughout the several counties of the State. Numerous inquiries have arisen with reference to certain of these transfers, particularly as to the question of whether or not a filing tax would be due for the recording of these transfer agreements. It seems that there is a diversity of opinion among some of the judges of probate as to the matter of liability for the filing tax on certain of these instruments and, after consultation with the local representative of the Gulf Oil Corporation, it has been determined that the best course of action to pursue is to request an opinion from your office as to this matter. As noted, it affects almost every county of the State and, hence, it would seem wise that there be an opinion so that we may all proceed on a uniform basis in this matter. Of course, the interest of this department arises due to the fact that audit must be made of the revenues collected by the various probate offices in the form of filing tax and it is necessary that we be advised as to the amounts due in order that we may proceed on a uniform basis in these audits.

"I enclose herewith photostatic copy of the type instruments being presented by the Gulf Oil Corporation for recording in many of the counties. These include a copy of the transfer agreement earlier referred to: a transfer of certain leases existing between the corporation and property owner of the county; lease option with lease agreements attached; mortgages; building loan agreements; purchase options and bonds. I feel that I should point out that each of the instruments to which reference is made through these transfer agreements has previously been recorded in the appropriate probate office and what is now sought to be done is to transfer the properties or interest conveyed by such instruments to the Gulf Oil Corporation, successor to the Gulf Refining Company. There is no new recording called for but a transfer of interest covered by previously recorded instruments.

"I have asked the Gulf Oil Corporation to furnish me with a brief

description of the type instruments covered by these agreements which they have done. These descriptions are as follows:

"**Leases**—The leases are usually entered into between the Gulf Refining Company and the property owner. As a general rule they are either for a ten or fifteen-year-period and cover both the property and any improvements that may be put thereon. In quite a few cases some financial commitment on the part of the Corporation has been made and this commitment leads to the recordation of other documents as set forth below.

"**Lease Options with Lease Agreements Attached**—This type of document is usually used in the case of a loan to a property owner to erect a building in which he intends to operate his own business. In the event that said property owner ceases for any reason to operate the business, this Lease Option gives the Corporation the right to take over the property on a lease basis at such time as the owner defaults in his operation.

"**Mortgages**—Mortgages are usually between the Corporation and a property owner and as a general rule cover the land and improvements upon which the Corporation has made a financial commitment as outlined in the discussion of leases above.

"**Building Loan Agreements**—These are agreements entered into between the Corporation and the property owner at the time that improvements are erected through a financial commitment by the Corporation.

"**Purchase Options**—These are usually straight purchase options with a stated price or, in some cases, first refusal purchase options between the Corporation and the property owner.

Bonds—Usually the only time that a bond is executed between the Corporation and the lessor is when the lessor actually contracts to erect improvements on the property and is regarded by the Corporation as the contractor. In such case the lessor is bonded.

"It would be appreciated if you would furnish your opinion as to whether or not there would be a filing tax due upon the transfer of any or all of the above instruments from the Gulf Refining Company to the Gulf Oil Corporation through the means of the transfer agreements set out in the photostatic copy attached."

The photostatic copy of the instrument forwarded with your request shows on its face that it is an absolute sale, transfer and conveyance of all of the property and assets of "every kind, character and description located in Dale County, Alabama" of Gulf Refining Company to Gulf Oil Corpor-

ation. The instrument is in the nature of both a deed and assignment. However, the instruments referred to in Exhibit "A" thereto consist of only Mortgages, Leases, Lease Options with Lease Agreement attached, Building Loan Agreements, Purchase Options and Bonds.

Assuming that the Mortgages referred to have been filed for record and the mortgage tax paid thereon, the assignment thereof, would not be subject to the mortgage tax. Sections 618, 619, Title 51, Code of Alabama 1940.

Section 618, supra, provides for the payment of deed tax on all deeds, bills of sale and other instruments of like character which conveys real or personal property within this State or which conveys an interest therein. The base or measure of the tax is the value of the property conveyed in the deed or lease. I am, therefore, of the opinion that the assignment of the lease is subject to the deed tax when filed for record. A lease conveys an interest in real estate or personal property and the consideration expressed in the lease is not necessarily controlling in determining the measure of the tax; but the Judge of Probate of the county involved may take into consideration the fact that the lease extends over a period of years and, from all of the facts available, compute the present value of the lease or leasehold interest that is assigned by the document in question. Biennial Report Attorney General of Alabama, Oct. 1, 1934-Sept. 30, 1936, p. 202, Quarterly Report Attorney General of Alabama, Vol. 58, p. 126.

Lease Option with Lease Agreement Attached. I have not seen this document and, therefore, cannot definitely state whether or not it actually conveys an interest in property. A bare option would not ordinarily convey an interest in property. However, this document, with respect to the lease agreement phase, would probably convey some interest in property and would, therefore, bear the filing tax to that extent. The mere fact that the "Lease Agreement" is "attached" would not make the lease less binding. Consequently, you should give careful consideration to the import of this document in determining the value of the property or interest conveyed, if any.

Building Loan Agreements would not ordinarily be subject to a deed or mortgage tax and assuming that the Building Loan Agreement referred to is of that type, I am of the opinion that same would not require a deed tax or a mortgage tax nor would the assignment thereof require such tax.

A **Purchase Option** would not ordinarily convey any interest in property and assuming that the Purchase Option is in fact an "option" then there would be no deed tax due upon the recordation of same nor upon its assignment. What has been said as to the filing tax with respect to Purchase Options applies equally in the case of the **Bonds** referred to in Exhibit "A".

While Exhibit "A" shows transfer of specific items involving property, the instrument offered for record is a conveyance of all property of Gulf Refining Company to Gulf Oil Corporation and as a matter of precaution, the Judge of Probate should satisfy himself that no additional property was owned by Gulf Refining Company in Dale County.

In view of the above, the Judge of Probate in determining the amount of filing tax due upon recordation of the instrument should ascertain the value of the property conveyed or interest therein by each of the above instruments, with the noted exceptions, and should accordingly collect the tax.

Very truly yours,

JOHN PATTERSON
Attorney General

March 6, 1958

Honorable Guy D. Roberts
Chairman
Morgan County Board of Revenue and Control
Decatur, Alabama

Counties—Morgan County—Road and Bridge Fund—Funds—Opinions Overruled, Modified or Distinguished.

1. The County governing body of Morgan County, in its discretion, may purchase an automobile for the chairman of the board to be used in connection with his duties relating to roads and bridges of the County and in the performance of his other official duties.

2. The automobile may be paid for from the gasoline fund, when it is to be used exclusively for road and bridge purposes, or jointly from the gasoline fund and general fund in proportion to its use for road and bridge purposes, and for other official purposes other than those relating to roads and bridges.

3. Opinions reported in Quarterly Reports of Attorney General, Vol. 1, page 304 and Vol. 59, page 135, overruled insofar as in conflict herewith.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of February 28, 1958, is as follows:

"Your official opinion is respectfully requested on the following question:

"May the Morgan County Board of Revenue and Control purchase an automobile for the Chairman of said Board for official use in County business? If the answer to this question is in the affirmative, please advise me from what funds the purchase can be made."

Accompanying your request is a letter from Mr. Robert Straub, former Assistant Attorney General, which suggests there is an apparent conflict between the opinion of this office reported in Quarterly Report of Attorney General, Vol. 59, page 135, and the two reported in Vol. 63, page 9 and Vol. 67, page 76. The question presented, in the light of Mr. Straub's letter, calls for a reconsideration of these opinions.

The opinions reported in Vol. 63 and Vol. 67, supra, do not mention the opinion reported in Vol. 59, supra; and, the case of **Ensley Motor Car Co. v. O'Rear**, 196 Ala. 481, 71 So. 704, is not mentioned in the opinion in Vol. 59, supra, although cited as authority in both of the opinions reported in Vol. 63 and Vol. 67, supra.

The opinion in Vol. 59, supra, dealt with a local act, Act No. 171, General and Local Acts 1949, page 198, which provided:

"Each County Commissioner shall receive a monthly salary of not exceeding two hundred fifty dollars each month, to be fixed from time to time by the Court of County Commissioners, which salary shall be in lieu of all fees, per diem, expenses or other compensation now allowed by law to such commissioner for services rendered in and about his duties as such commissioner. . . ."

The ruling of this office was that the furnishing of a county vehicle, together with all gasoline, oil and repairs, for the use of such commissioners in and about the performance of their duties as such, is an additional expense prohibited by the terms of Act No. 171, supra.

The opinion in Vol. 63, supra, dealt with Local Act No. 250, Local Acts 1947, page 181, which after fixing an annual salary for the president and members of the board of revenue, provides in Section 7, the following:

"Automobile Expense. Where any member of the board shall use his privately owned automobile in and about the performance of his duties,

he shall be furnished by the county, and at its expense, gasoline and motor oil, not to exceed fifty (50) gallons of gasoline and one (1) gallon of motor oil during any calendar month, to be used in his said automobile while engaged in the performance of the duties of his office."

Then, by Section 10, the following is provided:
". . . Neither the president nor the associate members of the board shall be entitled to any addtiional compensation, ex officio fees or charges, or to draw any mileage or per diem. The compensation provided in this section shall be the full compensation which the said president and associate members of the board shall be entitled to receive for their services."

The ruling of this office was that the Board of Revenue of Etowah County may purchase and maintain automobiles for members of said Board for use in the performance of their official duties in respect to roads and bridges of the County, or in the performance of other official duties.

The opinion in Vol. 67, supra, involved Act No. 22, Local Acts 1945, page 23, relating to Covington County. After providing for salaries of twenty-four hundred dollars ($2400) annually, Section 12 provides:

"Additional Allowances: No other compensation or allowance other than provided in Section 11 hereof shall be paid to said president and associate members, except that they, the clerk, county road supervisor, and other employees shall be reimbursed lodging, meals, and transportation, not to exceed 5¢ per mile, while out of the county on official business at the direction of the board and attending meetings or conventions pertinent to County affairs or programs. . ."

This office ruled that the governing body may purchase an automobile for each of its members to be used in the performance of their duties, if thought necessary by the board of revenue.

In each of these latter two opinions, **Ensley Motor Car Co. v. O'Rear,** supra, was cited as authority for the rulings. It is important to see, therefore, what that case involved.

The original record of the above case shows that recovery was sought for an automobile sold to the Board of County Commissioners of Walker County to be used by said Board exclusively in the performance of their duties as such Board in maintaining, constructing and inspecting the roads and bridges of Walker County.

The automobile was sold in 1915, and the law then provided compensation to county commissioners at the rate of three dollars ($3.00) per day while occupied in the discharge of their duties and five cents ($.05) per

mile for each mile necessarily traveled by them in so doing. See Section 6771, Code of Alabama 1923.

Based principally on General Acts 1915, page 573, now Section 43, Title 23, Code of Alabama 1940, the court held that the County's authority having been exercised in the purchase for the County of an automobile, for the purpose of constructing, maintaining, and inspecting the roads and bridges of Walker County, and a proper warrant having issued therefor, such warrant should be duly registered and paid by the County Treasurer in the manner required by law. General Acts 1915, supra, deals with the general superintendence over public roads and bridges and the unlimited jurisdiction and powers over same by the courts of county commissioners.

The court pointed out that the above power is to be exercised by such courts or boards as deemed necessary or advisable for the public weal, and cannot be exercised for them, nor can their exercise thereof be restrained or reviewed, unless it has been in fraudulent, corrupt or unfair conduct of the business of the county.

There does not appear to me to be any reasonable basis for a distinction in any of the above situations for if furnishing and maintaining an automobile in one case is an additional expense allowance, it seems to me that the same is true as to all of the above situations. In each case, the Legislature has fixed the amount of the expense allowance, or has indicated that it should be paid out of the salary. It would seem, therefore, to be in keeping with opinions such as that appearing in Vol. 59, supra, to say that it must remain as so fixed until changed by the Legislature and that the county governing body is without authority to change it by furnishing and maintaining an automobile in the absence of express authority to that end. **Woodruff v. Beeland,** 220 Ala. 652, 127 So. 235.

It is contended by some that the furnishing of an automobile and the maintenance of same indirectly amounts, in some instances, to a greater expense allowance than that provided by statute, and in other cases, it indirectly amounts to an increase in the compensation of the board members.

The opinions of this office reported in Quarterly Reports of Attorney General, Vol. 21, page 228, Vol. 21, page 240, are to the effect, however, that the furnishing and maintenance by the county of an automobile for use of the board members, or superintendent of public roads in road and bridge work, required to be performed by them, "cannot in any proper sense be regarded as additional compensation or reimbursement of expense incurred by them." The automobiles were considered merely as a part of the county's equipment for use in road work in the same sense that picks, shovels, steam rollers, etc., are equipment.

Turning now to the question at hand, it appears that the Board of

Revenue and Control of Morgan County was created and established by Act No. 129, Local Acts of Alabama 1939, page 70. The Board consists of five (5) members, one of whom is Chairman. The County is divided into four (4) districts and each member, other than the Chairman, has a district under his supervision and control.

In addition to the duties specified in the Act, the Board has all of the jurisdiction, power and authority granted to and conferred on courts of county commissioners, boards of revenue, or the like county governing bodies, by the general laws of Alabama.

The whole Board is given authority to locate, construct, supervise, repair and maintain and have control of the public roads, highways and bridges of the County, but each board member, other than the Chairman, is appointed supervisor of all public roads within the district in which he is elected, with the duty to supervise and inspect and superintend all work within his district.

The Chairman of the Board votes in case of a tie; writes or supervises the writing of minutes at meetings; signs for and on behalf of the County all warrants, checks, drafts, etc.; exercises all the power and jurisdiction and duties provided by the general laws of the State of probate judges, in connection with courts of county commissioners or other like governing bodies; acts as purchasing agent for supplies, materials, appliances, equipment, machinery, gasoline, etc., for the Board of Revenue and Control, and also makes purchases for the probate judge, sheriff, register, clerk of the circuit court, Clerk of the Morgan County Court, county superintendent of education, tax collector and tax assessor.

The members of the Board, other than the Chairman, by Act No. 129, supra, each receive an annual salary of twenty-four hundred dollars ($2400), with the provision that said salary shall be the sole and only compensation, allowance, or expenses of any kind to be received by either of said members, except five cents ($.05)) per mile mileage from his rsidence to the county seat and return for attending each regular meeting of the Board.

It is provided that the Chairman shall receive an annual salary of thirty-six hundred dollars ($3600), but no mileage is provided and there does not appear to be any provision designating the salary to be the only compensation, allowance or expense as is provided as to the other four (4) members of the Board.

By separate act, and not by way of amendment of Act No. 129, supra, it is now provided by Act No. 437, General and Local Acts 1951, page 789, as amended by Act No. 524, General and Local Acts 1955, page 1173, that the members of the Board of Revenue and Control of Morgan County shall each receive an annual salary of forty-two hundred dollars ($4200) in addition to the mileage now provided them by law for attending regular meet-

ings of said Board. The Chairman receives, as compensation for his services, an annual salary of sixty-two hundred dollars ($6200), but no mileage.

It is impossible for me to tell what part or proportion of the Chairman's time is devoted to road and bridge work, which, in my opinion, would include the purchasing of equipment, supplies, etc., for that purpose, and that proportion which is devoted to other duties, but I am of the opinion that his statutory duties are such as to bring him within the rulings of this office reported in Vol. 21, supra; Vol. 63, supra; and Vol. 67, supra, and the opinions of the Supreme Court of Alabama cited therein. These sustain an affirmative answer to the first part of your inquiry, provided the Board of Revenue and Control determines in good faith that an automobile is necessary for the proper performance of the duties of the Chairman.

The opinions of this office reported in Quarterly Reports of Attorney General, Vol. 1, page 304 and Vol. 59, page 135 are not in accord with the views now expressed and insofar as they conflict herewith are hereby overruled.

Where the automobile is to be used solely for the construction, maintenance, supervision and policing of the public roads and bridges in Morgan County, the purchase may be made from the gasoline fund. Quarterly Report of Attorney General, Vol. 67, page 76.

If, say, sixty percent of the use of the automobile is for road and bridge work and forty percent for the other duties of the Chairman, then I see no valid reason why sixty percent could not be paid from the gasoline fund and forty percent from the general fund. Such, or similar provision, has been made by the Legislature with reference to the salaries of members of the county governing bodies. Title 51, Section 655, Code of Alabama 1940, as amended by Act No. 838, General and Local Acts 1953, page 1129.

Yours very truly,

JOHN PATTERSON
Attorney General

March 10, 1958

Hon. Handy Ellis
Chairman
Democratic Executive Committee
Shelby County
Columbiana, Alabama

Elections—Absentee Ballots—Candidates—Clerks of Circuit Courts—Registers—Opinions Overruled, Modified or Distinguished.

1. Under Title 17, Section 344, Code of Alabama 1940, as amended by Act No. 601, General Acts 1947, page 444, an unopposed candidate for nomination becomes the party nominee and his name does not appear on the ballot in the primary election.

2. A circuit clerk who is a candidate for nomination as circuit clerk, but is unopposed, is not disqualified to serve on the appointing board as provided by Title 17, Section 122, Code of Alabama 1940.

3. A register in chancery who is also the circuit clerk and is a candidate for nomination as such clerk, but is unopposed, is not prohibited from handling absentee ballots as provided by Act No. 424, General and Local Acts 1949, page 601 (Title 17, Section 64 (18), 1955 Cumulative Pocket Part, Code of Alabama 1940).

4. Opinion reported in Quarterly Report of Attorney General, Vol. 66, page 94, overruled.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of March 3, 1958, is as follows:

"I shall appreciate your answer to the following inquiries:

"1. May the Circuit Clerk of Shelby County, who is a candidate for reelection, but who is unopposed, serve on the appointing board as provided by Title 17, Section 120 of the Code of Alabama of 1940?

"2. May the Register of Shelby County, who is also the Circuit Clerk and a candidate for reelection in the Democratic primary to be held

May 6, 1958, but as such candidate he is unopposed and the deadline for qualifying for such office has passed, perform the duties with reference to absentee voters as provided by the provisions of Title 17, Section 64(15), et seq.?

"Permit me to call to your attention Title 17, Section 344 of the Code of Alabama of 1940, a portion of which reads as follows: 'If a legally qualified candidate for nomination to an office is unopposed when the last day for certifying candidates is past, his name shall not be printed on the ballot to be used in the primary election, and he shall be the nominee of the party with which he has qualified for office.' "

My answer to both of your questions is in the affirmative.

Title 17, Section 122, Code of Alabama 1940, provides that if any member of the appointing board, namely the judge of probate, sheriff or clerk of the circuit court, is a candidate for election to any office, then such member of the board may not serve in the election in which he is a candidate.

Section 3 of Act No. 424, General Acts 1949, page 601, appearing as Title 17, Section 64(18), 1955 Cumulative Pocket Part, Code of Alabama 1940, provides that if the register in chancery is a candidate for office, he shall be disqualified from performing his duties in reference to the handling of absentee ballots in that election.

Title 17, Section 344, Code of Alabama 1940, as amended by Act No. 601, General Acts 1947, page 444, provides that if a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, then such person's name shall not appear on the ballot in that election and he shall thereupon be the nominee of the party with which he has qualified for the office he seeks.

The question to be determined in this regard is: When does the circuit clerk in this instance cease to become a candidate?

Section 344, as amended, supra, provides that in the case of candidates for county offices, the chairman of the county executive committee shall certify to the judge of probate at least forty days prior to the date of holding the election the names of all candidates nominated for county offices. As pointed out hereinabove, if any legally qualified candidate for nomination is unopposed on the last date for certifying candidates by the county executive committee to the judge of probate, then his name shall not appear upon the ballot. It, therefore, follows that upon this date if a legally qualified candidate for nomination to an office is unopposed, he ceases to be a candidate for nomination and becomes the nominee of the party by operation of law.

You are, therefore, advised that a circuit clerk who is a candidate for nomination as circuit clerk, and is unopposed, may serve upon the appointing board as provided by Title 17, Section 120, Code of Alabama 1940. By like reasoning, the register in chancery who is also the circuit clerk, and is unopposed for nomination as circuit clerk, may handle the absentee ballots as provided by Act No. 424, supra.

The opinion of this office appearing in Quarterly Report of Attorney General, Vol. 66, page 94, which reaches a contrary conclusion to that hereinabove set forth, is hereby expressly overruled and withdrawn.

Yours very truly,

JOHN PATTERSON
Attorney General

March 31, 1958

Honorable W. L. Horn
Commissioner of Revenue
Department of Revenue

CAPITOL

Licenses—Vending Machines—Words and Phrases—Opinions Overruled, Modified or Distinguished.

1. Candy bars, cakes and other confections, even though containing peanuts, are not "peanut products" within the meaning of Act No. 566, General and Local Acts 1957, approved September 18, 1957, unless such is composed principally of "peanuts or peanut derivatives" with any other ingredient merely incidental thereto.

2. Coin-in-the-slot machines vending other products along with peanuts, peanut-butter sandwiches and peanut products are subject to the higher license rate under Act No. 566, supra.

Opinion by Assistant Attorney General Young.

Dear Sir:

Your request for an official opinion bearing date of December 12, 1957, is as follows:

"Re: 1957 Amendment to the Vending Machine License Tax.

"During the Regular Session of 1957, the Legislature amended the vending machine license statute levied under Title 51, Section 613, as amended, Code of Alabama 1940, by Act No. 566, approved September 23, 1957, and by adding to said Code Section, as amended, the following proviso:

" 'Providing further that the license on vending machines vending only peanuts, peanut-butter sandwiches and peanut products shall be $2.00; $1.00 for the State and $1.00 for the county and said license shall be paid by the owner of the machine; and provided also that no municipality shall impose a license on such a machine in excess of 50% of the amount of the State and county license.'

"In this respect I would like to have your official opinion, as follows:
"1. What is meant by the terms 'peanuts' and peanut products' as are contained in this proviso? Is the term 'peanut products' limited and confined to products directly derived from peanuts such as peanut butter, cooking oil, peanut oil, etc., or does such term have a broader meaning so as to also include such products as candies and cakes which have peanuts in them?

"2. Where a coin-in-the-slot vending machine has two or more sections, some of which sections have peanuts or peanut butter sandwiches in them and other sections of the same machine have plain cakes or candies in them which do not contain any peanuts, would such a multiple section vending machine require the regular vending machine license under Section 613, supra, or would it only be subject to the $2.00 license provided for in the 1957 Amendment?

"As the Department of Revenue has already received several inquiries accordingly from Judges of Probate and license inspectors throughout the State, and as they are holding up the issuance of several licenses pending a reply from this Department, I would appreciate an early reply from you.

"I also request that you write this opinion in official form in order to avoid a multiplicity of such requests and answers thereto."

In answer to the first inquiry above, it is my opinion that the provisions of Act No. 566, General Acts 1957, approved September 18, 1957, amending §613 of Title 51, Code of Alabama 1940, do not extend to such products as candies, cakes or other confections, even though such products may contain peanuts or peanut derivatives, unless such candy, cake or other confection is composed principally of peanuts or peanut derivatives with any other ingredient merely incidental thereto.

Acknowledging that there are confections utilizing as their principal ingredient milk chocolate, syrup, or some other similar product with the peanut or peanut derivative merely added as an incidental ingredient to provide flavor or solidity, we have on the other hand peanuts alone being processed into a marketable candy bar with the addition of only syrup or honey as an adherent. And, of course, between these extremities lies an infinite number of possible concoctions—all containing peanuts in varying degrees.

Therefore, it would not be possible, nor feasible to attempt, to make a designation or classification of all confections which are by their composition "peanut products" and those which are not. Instead, the circumstances in each instance must govern with the stated prerequisite—that the article be "composed principally of peanuts or peanut derivatives" as the criterion for making this determination. This would be a matter of administrative determination in each particular case.

As to the second inquiry, it is clear by the language of the enactment in question that where a coin-in-the-slot vending machine has two or more sections, some of which sections have peanuts, peanut-butter sandwiches or peanut products in them and other sections of the same machine have cakes or candies in them which are not composed principally of peanuts or peanut derivatives, the regular vending machine license under Section 613, supra, is required. The pertinent provisions of Act No. 566, supra, are as follows:

> ". . . Provided further, that the license on vending machines vending **only** peanuts, peanut-butter sandwiches, and peanut products shall be two dollars, one dollar for the State and one dollar for the county, and said license shall be paid by the owner of the machine; . . . . " (Emphasis added.)

The opinion concerning this matter rendered to you January 10, 1958 is hereby recalled and changed to conform to the above with this opinion being rendered in lieu thereof.

Yours very truly,

JOHN PATTERSON
Attorney General

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